Filed 1/11/10 American Casualty Co. of Reading v. Children's Hospital Ins. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, Plaintiff and Respondent, v. CHILDREN'S HOSPITAL INSURANCE LIMITED et al., Defendants and Appellants.	D054552 (Super. Ct. No. 37-2007-00084178-CU-MC-CTL)
SONJI WASHINGTON, Plaintiff, v. ERIC CAMERA et al., Defendants.	(Super. Ct. No. GIC861280)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

In this action for equitable subrogation and related counts, defendants Children's Hospital Insurance Limited (CHIL) and Rady Children's Hospital of San Diego (Rady) appeal a summary judgment for plaintiff American Casualty Company of Reading, Pennsylvania (American Casualty). CHIL and Rady contend American Casualty is not entitled to a judgment as a matter of law because it did not satisfy certain of the elements of an equitable subrogation claim, including that Rady's employee, the defendant in the underlying action, was entitled to benefits under the CHIL policy; American Casualty was not primarily responsible for the claimed loss in the underlying action; American Casualty did not pay defense costs and indemnity in the underlying action as a volunteer; and justice requires that the entire loss be shifted to CHIL and Rady. We find no triable issues of fact and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Filing of Underlying Lawsuit

Eric Camera was formerly a registered nurse at Rady. In February 2006 Sonji Washington filed a form complaint against Camera and Rady for negligence and intentional tort (*Washington* action). The complaint alleged that on February 14, 2005, Washington was at Rady with her infant son, who was a patient there; Camera approached her and offered to assist her in injecting insulin, which she takes for diabetes; he injected her with an "unknown substance," after which she "became drowsy and fell into a semi-conscious state," and; he "then sexually assaulted and/or molested [her]."

In October 2006 Washington filed a first amended complaint against Camera and Rady. The amended complaint contained causes of action against Camera for sexual battery, battery, assault and negligence, and against Rady for negligent hiring, supervision and retention. The original complaint and the first amended complaint alleged essentially the same facts.

The sexual molestation allegations were not substantiated, but Rady fired Camera because of "misuse of hospital equipment and other violations of hospital policies and procedures."

CHIL Policy

Under a collective bargaining agreement between Rady and United Nurses of Children's Hospital, Rady was required to carry "medical malpractice insurance coverage which includes Registered Nurses in its employ in the course and scope of employment, which includes provisions to defend and indemnify."

Rady and its employees were covered by a professional liability policy issued by CHIL. CHIL, which is wholly owned by Rady, holds a " 'Class 2' insurance license issued by the Bermuda Monetary Authority." Under the policy, Rady is the "Named Insured," and an employee of Rady is an "Insured."[1] The policy covers claims against

---

1 Throughout this opinion we omit boldface type in the insurance policies.

Rady and its employees arising from their provision of "professional services," which is defined as "the rendering of professional health care services."[2]

Further, the CHIL policy includes a "Sexual Misconduct Endorsement." It provides: "Where a claim of Sexual Misconduct is made by a patient (or by a patient's family member) of the Named Insured, the claim shall be deemed to arise from professional services." "Sexual Misconduct" is defined as "sexual abuse, sexual exploitation, or sexual molestation for which an Insured is alleged to be liable, including but not limited to, any sexual involvement, sexual conduct or sexual contact, whether or not consensual, and any claims relating thereto such as negligent hiring/supervision of a person allegedly engaging in Sexual Misconduct."

As to a duty to defend, the CHIL policy states: "We shall delegate the defense of any suit brought against you for [covered] damages . . . . We will reimburse the Named Insured for the following: [¶] 1. All expenses incurred. [¶] 2. All reasonable expenses incurred in the investigation or defense of the claim or suit . . . ." Additionally, the policy stated, "We will reimburse the defense costs incurred by counsel selected and appointed by the Named Insured for the defense of any covered Claim. This includes the costs of: [¶] . . . [¶] 2. investigating any Claim(s) as appropriate."

---

2 The insuring provision does not use the terms "Named Insured" and "Insured." Rather, it states: "This agreement provides coverage against Healthcare Professional Liability Claims brought against *you* resulting from Professional Services provided by *you*." (Italics added.) The insuring provision also states: "This agreement covers *you* and others covered for damages which *you* become legally obligated to pay resulting from any of the following: [¶] . . . [¶] B. The providing or withholding of professional services by anyone for whose acts *you* are legally responsible." (Italics added.)

As to other insurance, the CHIL policy provides: "If other valid insurance applicable to the risk is available to the Named Insured for a loss we cover, this insurance shall recognized [*sic*] as follows: [¶] A. Excess [¶] 1. When this insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, we shall have no duty to defend any claim or suit that any other insurer has a duty to defend. If no other insurer defends, we shall undertake to do so within policy limits, but we shall be entitled to your rights against all those other insurers."

American Casualty Policy

Camera was also insured under a professional liability policy he purchased from American Casualty for an $89 annual premium. The policy provides, "We will pay all amounts, up to the Professional Liability limit of liability stated on the certificate of insurance [$1 million per claim], that you become legally obligated to pay as a result of a professional liability claim arising out of a medical incident by you or by someone for whose professional services you are legally responsible." As to a duty of defense, the policy states, "We have the right and duty to defend any claim that is a professional liability claim."

As to other insurance, the policy provides: "If there is any other insurance policy . . . that applies to any amount payable under this Policy, such other insurance must pay first. It is the intent of this policy to apply only to the amounts covered under this Policy which exceed the available limit of all deductibles, limits of liability or self-insured amounts of the other insurance, whether primary, contributory, excess, contingent or otherwise. This insurance will not contribute with any other insurance."

Tenders of Defense, Provision of Defense and Settlement of Underlying Action

Camera was served with the complaint in the *Washington* action in late April 2006. In a May 24, 2006 letter, his personal attorney, T. Hall Brehme IV demanded that Rady provide Camera with a defense and indemnification in the matter. The letter requested a written response from Rady within 10 days. Rady did not respond.

On August 21, 2006, Camera tendered the defense of the *Washington* action to American Casualty. In September 2006 American Casualty's claims specialist, Arlene Foster, spoke with Brehme, and he advised her that he had also tendered the defense to Rady and was waiting for a response. Foster told Brehme that American Casualty would likely defend Camera under a reservation of rights. Foster contacted Rady's counsel to determine whether it planned to defend Camera, and counsel stated Rady was considering the matter.

In February 2007 Brehme notified Foster that Rady had not agreed to defend Camera. On February 14, Foster e-mailed Rady and asked for a copy of its insurance policy. In a March 1, 2007 letter, Rady advised Brehme that it agreed to accept the tender of Camera's defense with a reservation of rights pertaining to his alleged intentional wrongdoing. The letter stated Rady would "pay reasonable and necessary attorney's fees incurred," and it had "retained the law firm of Lewis, Brisbois, Bisgaard & Smith [Brisbois], with regard to this matter."

In an April 18 letter, Brehme notified Foster that Rady had neither hired an attorney to represent Camera nor "paid a dime" toward his legal fees. Brehme asked Foster to confirm that American Casualty would pick up Camera's defense.

In an April 20 letter, Brisbois notified Brehme it had appointed Attorney Sheila Trexler, of the Neil, Dymott, Frank, McFall & Trexler firm, to represent Camera. Rady refused his request for independent counsel. Brehme refused to sign a substitution of attorneys, but he agreed to Trexler's association into the case.

On April 30, 2007, American Casualty accepted Camera's defense subject to a reservation of rights. American Casualty wrote that its provision of a defense was not to be construed as a waiver of the "other insurance" clause of its policy. American Casualty agreed to pay for independent counsel for Camera as of the date of tender.

The *Washington* action was settled in August 2007 for $15,000, with Rady and/or CHIL paying $7,500 and American Casualty paying $7,500.[3] Additionally, American Casualty paid $71,112.16 for Camera's defense costs. Rady and CHIL admit they never reimbursed Camera for any of Brehme's attorney fees, and CHIL admits it never appointed an attorney for Camera in the *Washington* action.

Current Lawsuit

In March 2008 American Casualty filed a first amended complaint (hereafter complaint) against Rady and CHIL. The complaint included counts for declaratory relief (first through fourth), equitable subrogation (fifth), equitable indemnity (sixth) and equitable contribution (seventh).

---

[3] The record does not reveal whether Trexler actually provided Camera with any legal services or, if so, whether she was involved in the settlement negotiations in the *Washington* action.

American Casualty moved for summary judgment, or alternatively, summary adjudication. Rady and CHIL filed separate motions for summary adjudication. After a hearing on October 31, 2008, the court granted American Casualty's motion and denied Rady's and CHIL's motions. The court determined Rady had a duty to defend Camera in the *Washington* action as he was acting within the course and scope of his employment when he engaged in the alleged conduct; CHIL had a duty to defend Camera because its policy did not expressly negate the implied covenant to defend; American Casualty was not primarily liable for costs of defense and indemnification, and justice required that the loss be shifted from it to Rady and CHIL. Judgment was entered for American Casualty on December 5, 2008, in the amount of $78,612.16. The judgment states Rady and CHIL "shall allocate between themselves responsibility for payment thereof."

DISCUSSION

I

Standard of Review

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) A "plaintiff bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto. [Citation.] A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Id.* at p. 850.)

We review the trial court's ruling on a summary judgment motion de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

II

Equitable Subrogation from CHIL

A

Legal Principles

" 'Equitable subrogation permits a party who has been required to satisfy a loss created by a third party's wrongful act to "step into the shoes" of the loser and pursue recovery from the responsible wrongdoer. [Citation.] In the insurance context, the doctrine permits the paying insurer to be placed in the shoes of the insured and to pursue recovery from third parties responsible to the insured for the loss for which the insurer was liable and paid.' [Citation.] Because subrogation rights are purely derivative, an insurer cannot acquire anything by subrogation to which the insured has no right and can claim no right the insured does not have." (*United Services Automobile Assn. v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 645.)

"The essential elements of an insurer's cause of action for equitable subrogation are as follows: [1] the insured suffered a loss for which the defendant is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; [2] the claimed loss was one for which the insurer was *not* primarily liable; [3] the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; [4] the insurer has paid the claim of its insured to protect its own interest and not as a

volunteer; [5] the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; [6] the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; [7] justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and [8] the insurer's damages are in a liquidated sum, generally the amount paid to the insured." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1292 (*Fireman's Fund*).)

B

Entitlement to Benefits

CHIL asserts American Casualty did not satisfy the first element of the *Fireman's Fund* test because there are triable issues of fact as to whether Camera was entitled to a defense or indemnity under the CHIL policy. (*Fireman's Fund, supra*, 65 Cal.App.4th at p. 1292.) CHIL submits that the "issue of whether Camera was providing 'professional services' on behalf of Rady was not resolved in the *Washington* [action], and cannot be resolved on the facts in the record here." We conclude that as a matter of law the first element was satisfied.

" 'A liability insurer owes a duty to defend its insured when the claim creates any *potential* for indemnity. [Citation.] The determination of whether the duty to defend arises is made by comparing the terms of the policy with the allegations of the complaint and any known extrinsic facts, and any doubt as to whether the facts create a duty to defend is resolved in favor of the insured.' " (*Pacific Indemnity Co. v. Bellefonte Ins. Co.*

(2000) 80 Cal.App.4th 1226, 1231, italics added.) " '[T]he insurer need not defend if the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage.*' " (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose*), quoting *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275, fn. 15.)

"[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify." (*Montrose*, *supra*, 6 Cal.4th at p. 299.) "The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage." (*Id.* at p. 295.) An insurer may not "deny an insured a defense at a time when it has reason to believe that there is potential liability under the insurance policy, and then rely upon the results of the [underlying action] and subsequent factors to prove that there was in reality no potential liability in the first instance." (*Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 173.)[4]

---

4 An insurer contesting coverage may provide its insured a defense under a reservation of rights or file a separate declaratory relief action. Alternatively, it may "simply deny the request [for a defense] and take its chance that the trier of fact in an action alleging bad faith breach of the contractual duty to defend will agree that no defense was owed [citation]." (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1792.) "The risk that an insurer takes when it denies coverage without investigation is that the insured may later be able to prove that a reasonable investigation would have uncovered evidence to establish coverage or a *potential* for coverage." (*American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1571, italics added.)

The CHIL policy covered Camera for claims arising from the provision of "professional services," defined as "the rendering of professional health care services." The original and first amended complaints in the *Washington* action included causes of action for *negligence* as well as intentional torts. The original complaint's negligence cause of action alleged Washington has diabetes, and when she was visiting her baby at Rady, Camera "offered [her] . . . assistance with administering insulin to herself." The first amended complaint's negligence cause of action incorporates essentially the same allegation, and also alleges Camera "so negligently and carelessly attended to [her] so as to cause . . . damages." The allegations of the complaints raised the potential of coverage under the CHIL policy and its duty to defend.

CHIL argues that " 'injecting an unknown substance' into someone who was not a patient to facilitate the alleged sexual assault" was "not a 'professional service' performed on behalf of Rady." The CHIL policy, however, does not limit coverage to claims brought by patients admitted to the hospital. The complaints alleged Camera performed a medical procedure, the giving of an injection. Further, although the complaints allege the substance Camera injected into Washington was unknown *to her*, they raise a *potential* for coverage because the evidence could show Camera injected her with insulin in a misguided effort to assist her, rather than with some other drug intended to facilitate a sexual molestation. In arguing the underlying complaints raised no potential for coverage, CHIL focuses too narrowly on the sexual molestation allegations.

American Casualty asserts the sexual misconduct endorsement of the CHIL policy also required CHIL to defend Camera.[5] CHIL argues the endorsement is inapplicable to an employee of Rady, because employees are defined as "Insureds" under the policy rather than the "Named Insured," and the endorsement includes the sentence, "Any coverage of persons other than the Named Insured is subject to the exclusions, limitations and other provisions set forth in this policy." It is unclear what that sentence means, but we are not required to interpret it.

As the California Supreme Court has held, in an action in which some claims are at least potentially covered by the policy and others are not, the insurer must defend the entire action. "To defend meaningfully, the insurer must defend immediately. [Citation.] To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not. To do so would be time consuming. It might also be futile: The 'plasticity of modern pleading' [citation] allows

---

[5] American Casualty notes that sexual misconduct is not insurable conduct. "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." (Ins. Code, § 533.) "Section 533 creates a statutory exclusion which is read into every insurance policy. . . . 'The public policy underlying section 533 is to discourage willful torts. [Citations.]' " (*Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 952-953.) "Sexual molestation is a 'willful act' under the statute. [Citation.] 'There is no such thing as negligent or even reckless sexual molestation.' " (*Id.* at p. 953.) As American Casualty points out, however, Insurance Code section 533 precludes only *indemnification* of willful conduct, and not the *defense* of an action in which such conduct is alleged. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 507-508.) " ' "[I]f the reasonable expectations of an insured are that a defense will be provided for a claim, then the insurer cannot escape that obligation merely because public policy precludes it from indemnifying that claim." [Citation.]' " (*Id.* at p. 508.) Thus, it appears that under the sexual misconduct endorsement to the CHIL policy, an insured could reasonably expect a defense of a claim for such conduct.

the transformation of claims that are at least potentially covered into claims that are not, and vice versa. The fact remains: As to claims that are at least potentially covered, the insurer gives, and the insured gets, just what they bargained for, namely, the mounting and funding of a defense. But as to the claims that are not, the insurer may give, and the insured may get, more than they agreed, depending on whether defense of these claims necessitates any additional costs." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 49.)

CHIL also complains that American Casualty did not prove the claim in the *Washington* action was covered by the CHIL policy for purposes of indemnity. It is well settled, however, that "[i]f an insurer, with notice of the pendency of the underlying action, wrongfully denies coverage or improperly refuses to provide its insured with a defense, then ' "the insured is entitled to make a reasonable settlement of the claim in good faith and . . . then maintain an action against the insurer to recover the amount of the settlement . . . ." [Citation.]' " (*Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 515.) Further, there is no indication that any part of the settlement pertained to the sexual misconduct allegations against Camera. American Casualty produced evidence that the allegations were not substantiated, and CHIL produced no countervailing evidence.

Camera was entitled to a defense and indemnification from CHIL, and American Casualty stands in his shoes for purposes of equitable subrogation.

C

Primary Liability

1

CHIL also contends American Casualty did not satisfy the second element of the *Fireman's Fund* test, by showing that as between the two insurers American Casualty was *not* primarily liable for the claimed loss in the *Washington* action. (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1292.)

CHIL asserts it is not primarily liable because its policy required it to reimburse defense costs rather than actually provide a defense. CHIL cites no authority to support the assertion, and develops no particular argument as to why an insurer with a reimbursement policy cannot, for equitable reasons, be considered primarily liable as against an insurer with a duty of defense. "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issue as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) As explained below, American Casualty has an enforceable "other insurance" clause that makes CHIL primarily liable even if it arguably had only had a reimbursement obligation.

In any event, we agree with the trial court's finding that the CHIL policy's reimbursement language is insufficient to negate the duty to defend. Under California law, a contract of "indemnity against claims, or demands, or liability . . . embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in

the exercise of reasonable discretion." (Civ. Code, § 2778, subd. 3.) The parties to an insurance policy may express an intent contrary to Civil Code section 2778, subdivision 3. (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 448 [policy permitted defendants to undertake defense at their option].) However, "the case law has long confirmed that, unless the parties' agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's active defense against claims encompassed by the indemnity provision." (*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 555; *Interstate Fire & Casualty Co. v. Stuntman Inc.* (9th Cir. 1988) 861 F.2d 203, 205 ["Under California law . . . an insurer's implied duty to defend may not be waived absent an explicit provision to that effect."].)

The CHIL policy includes no reimbursement clause applicable to a Rady employee. The policy requires the reimbursement of defense costs of the "Named Insured," which the policy defines as "the entity referenced on the Declaration Page." The declarations page refers to Children's Hospital and Health Center. We "do not rewrite any provision of any contract, including the standard policy underlying an individual policy, for any purpose." (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 968; *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 814.)

Further, the CHIL policy states, "We shall *delegate the defense* of any suit brought against *you* for damages covered under the Insuring Agreements of this policy." (Italics added.) There is no suggestion that the term "you" is inapplicable to a Rady employee.

The policy also states, "We will reimburse the defense costs incurred by *counsel selected and appointed by the Named Insured* for the defense of any covered claim." (Italics added.) These provisions indicate a duty of defense for Rady employees. As the trial court found, the implied covenant to defend "is not expressly negated by the confusingly drafted CHIL policy." At best, the policy is ambiguous, and the ambiguity is not susceptible to an interpretation favorable to CHIL. "If there is ambiguity . . . it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. [Citation.] If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. [Citation.] In the insurance context, we generally resolve ambiguities in favor of coverage." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

2

Additionally, CHIL submits the court erred by finding it was primarily responsible based on the "other insurance" clause in American Casualty's policy and the lack of any such clause in CHIL's policy that is applicable to Camera. CHIL asserts the "other insurance" clause in its policy applies to Camera, and the clauses in both policies essentially cancel each other out and require equitable contribution on a pro rata basis rather than equitable subrogation.[6]

---

6 "[T]he aim of equitable contribution is to apportion a loss between two or more insurers who cover the same risk, so that each pays its fair share and one does not profit at the expense of the others." (*Fireman's Fund, supra*, 65 Cal.App.4th at

We agree with the court's assessment. CHIL's policy provides: "If other valid insurance applicable to the risk is available to the *Named Insured* for a loss we cover, this insurance shall recognized [*sic*] as follows: [¶] A. Excess [¶] 1. When this insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, we shall have no duty to defend any claim or suit that any other insurer has a duty to defend. If no other insurer defends, we shall undertake to do so within policy limits, but we shall be entitled to your rights against all those other insurers." (Italics added.)

Since Camera is not the "Named Insured" under the CHIL policy the "other insurance" clause is inapplicable to him. Had CHIL intended that the provision apply to Rady employees, who the policy defines as "Insured[s]," it should have said so. Again, we cannot ignore the plain terms of the policy.

When potentially supportive of its position, CHIL argues the policy terms "Named Insured" and "Insured" are essentially used interchangeably.[7] CHIL submits that if we interpret the "other insurance" clause of its policy to apply strictly to Rady as the "Named Insured," CHIL could have no duty to defend Camera because the policy's provision for reimbursement of defense costs also refers to the "Named Insured." The policy states, "We shall delegate the defense of any suit brought against you for damages covered

---

p. 1296.) "Unlike subrogation, the right to equitable contribution exists *independently* of the rights of the insured." (*Id.* at p. 1295.)

[7] As discussed, CHIL took a contrary position on the sexual misconduct endorsement of the policy, which refers to the "Named Insured."

under the Insuring Agreements of this policy. We will reimburse the *Named Insured* for the following: [¶] 1. All expenses incurred. [¶] 2. All reasonable expenses incurred in the investigation or defense or the claim or suit." (Italics added.) CHIL submits that "either there was no duty under the CHIL Policy to reimburse defense costs or to settle in favor of Camera at all since he was not the 'Named Insured' . . . , or the 'other insurance' clause in the CHIL Policy must be construed to apply in this case." (Some capitalization omitted.)

Since the policy is a reimbursement policy, however, the language on which CHIL relies does not suggest it had no duty to defend an employee of Rady, as an "Insured" under the policy. Our reading of the CHIL policy reveals no intent to use the terms "Named Insured" and "Insured" synonymously. To the contrary, the policy separately defines the terms and uses one or the other depending on the context. For example, in a section titled "What To Do if You Have a Loss," the policy requires Rady's risk management department to provide CHIL with certain information, including "[w]hich Insured was involved." Under the heading "Transfer of Rights of Recovery Against Others to Us," the policy states: "If an Insured has rights to recover all or part of any payment we have made under this Coverage part those rights are transferred to us. The Insured must do nothing after the loss to impair our rights of recovery. . . . At our request the Insured will bring suit or transfer those rights to us and help us enforce them. If we recover more than we have paid, the excess will belong to the Insured who incurred the loss." The term "Insured" in these provisions cannot reasonably be interpreted to be interchangeable with the term "Named Insured."

The court properly found the CHIL policy contains no "other insurance" clause applicable to Camera. On the other hand, American Casualty's policy provides that "[i]f there is any other insurance policy . . . that applies to any amount payable under this Policy, such other insurance must pay first. It is the intent of this policy to apply only to the amounts covered under this Policy which exceed the available limit of all deductibles, limits of liability or self-insured amounts of the other insurance, whether primary, contributory, excess, contingent or otherwise. This insurance will not contribute with any other insurance." This provision applies to Camera.

3

Additionally, CHIL contends that since its policy and American Casualty's policies both cover the same risk, the court should not have considered the "other insurance" clause in American Casualty's policy in determining whether it met its burden of showing it is not primarily responsible for the loss in the underlying *Washington* action. CHIL argues that when two policies are primary policies, an "other insurance" clause that essentially renders one of the policies an excess policy is disfavored, and principles of equitable contribution rather than equitable subrogation apply.

"There is a distinction between primary and excess insurance coverage . . . . '*Primary* coverage is insurance coverage whereby, *under the terms of the policy,* liability attaches *immediately* upon the happening of the occurrence that gives rise to liability. [Citation.] Primary insurers generally have the primary duty of defense. [¶] '*Excess*' or *secondary* coverage is coverage whereby, *under the terms of the policy,* liability attaches

only after a predetermined amount of primary coverage has been exhausted.' " (*Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1255.) American Casualty agrees that both policies at issue here are primary policies.

" ' "Most insurance policies contain 'other insurance' clauses that attempt to limit the insurer's liability where other insurance covers the same risk. Such clauses attempt to control the manner in which each insurer contributes to or shares a covered loss." [Citation.]' Historically, 'other insurance' clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a particular loss. [Citation.] ' "[T]he application of 'other insurance' clauses requires, as a foundational element, that there exist multiple policies applicable to the *same loss*." [Citation.]' " (*Fireman's Fund, supra*, 65 Cal.App.4th at p. 1304.)

There are generally three types of "other insurance" clauses. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2008) ¶¶ 8:15 to 8:20, pp. 8-5 to 8-8 [hereafter Croskey].) Under a "[p]ro rata" clause, the insurer seeks to limit its liability to "the proportion that its policy limits bear to the total coverage available to the insured." (*Id.*, ¶ 8:16, p. 8-6.) Under an "[e]xcess only" clause, "[i]f there is other valid and *collectible* insurance, the insurer is liable only to the extent the loss exceeds such other insurance." (*Id.*, ¶ 8:19, p. 8-7.) Under an "[e]scape" clause, the "existence of other valid and collectible insurance *extinguishes* the insurer' s liability to the extent of such other insurance." (*Id.*, ¶ 8:20, p. 8-8.) The American Casualty policy contains an "excess only" clause.

"Contractual terms of insurance coverage are honored whenever possible. The courts will therefore generally honor the language of excess 'other insurance' clauses when no prejudice to the interests of the insured will ensue." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1304.)

When "two or more primary insurers' policies contain excess 'other insurance' clauses purporting to be excess to each other, the conflicting clauses will be ignored and the loss prorated among the insurers on the ground the insured would otherwise be deprived of protection," because "*primary* insurers with conflicting excess 'other insurance' clauses *can* have immediate defense obligations." (*Firemans Fund, supra,* 65 Cal.App.4th at pp. 1304-1305.) Further, " '[e]xcess-only' provisions often collide with 'pro rata' provisions," and in such instances courts hold the " 'excess-only' policies must contribute pro rata to the coverage afforded by the 'proration-only' policies." (*Id.* at p. 1305.) "In cases of mutually irreconcilable 'excess other insurance' provisions, the law generally favors proration among carriers." (*Id.* at p. 1306.)

Here, however, only one of the policies has an "other insurance" clause applicable to Camera. Thus, there is no conflict between the policies and no prejudice to him by honoring the clause in the American Casualty policy. Accordingly, we conclude equity should not be used to override the terms of the policy. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, 727. ["Because the policy terms, as they apply in this case, do not conflict or offend public policy and do not infringe on

any rights of the insured, there is no reason to disregard the express terms of both policies."].)

None of the cases CHIL cites holds that when only one of two policies covering the same risk contains an "excess only" clause it should be disregarded in favor of prorating the loss between the insurers, even when there is no prejudice to the insured. (See *Pacific Indemnity Co. v. Bellefonte Ins. Co.* (2000) 80 Cal.App.4th 1226, 1234 [conflict between "pro rata" clause and "excess only" clause]; *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, 1250-1252, [policies of four successive insurers had "other insurance" provisions, one of which purported to be "excess only"]; *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156, 1158 [conflict between "equal shares" clause and "excess-only" clause]; *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1307 [proration required despite "excess-only" clauses in some policies because during their terms "the insured had *no other insurance*"]; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078-1081 [court discussed whether hypothetical "other insurance" clause in missing policy could affect coverage].) While these opinions may contain broad general language helpful to CHIL, a "decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.)

CHIL's reliance on *American Continental Ins. Co. v. American Casualty Company of Reading, PA* (1999) 73 Cal.App.4th 508 (*American Continental*), is also misplaced. In *American Continental*, a hospital and one of its nurses were found jointly liable in an underlying wrongful death action. American Continental insured the hospital and its employees under a $1 million primary policy, and under a $10 million umbrella policy. The nurse also had a $1 million primary policy with American Casualty. American Continental settled the underlying action for $1,686,000 and sought declaratory relief pertaining to its rights against American Casualty. The American Casualty policy contained an "excess only other insurance" clause, and the American Continental primary policy contained a "pro rata other insurance" clause. (*Id.* at p. 514-515.)

The court noted that *where there is a conflict* between such clauses, "the current trend of jurisprudence in California is to prorate settlement and defense costs between the two policies." (*American Continental, supra*, 73 Cal.App.4th at p. 515.) The court held, however, that proration was not required because "the American Continental policy provided that its exposure was not to be reduced by the existence of other insurance: 'When this insurance is primary and the **insured** has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.' (Boldface in original.) Therefore, American Continental's primary policy is responsible for $1 million of the settlement, and American Casualty is responsible for the remainder, $686,000. The Hospital's excess umbrella policy is not reached." (*Id.* at p. 516.)

CHIL ignores the material facts of *American Continental*, claiming it stands for the proposition that "equitable subrogation only applies between carriers on two separate levels of risk; [*sic*] e.g., a primary carrier and an excess carrier." *American Continental* does not pertain to a scenario where only one of two primary policies includes an "excess only" clause, as here, and thus it is irrelevant to our analysis.

D

We are also unpersuaded by CHIL's argument there are triable issues of fact as to whether American Casualty established the fourth element of the *Fireman's Fund* test for equitable subrogation, that it did not provide Camera benefits as a volunteer. (*Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1292.)

CHIL's theory is that American Casualty had unclean hands by failing to timely pay Camera's defense bills, and it ultimately paid the full amount of some bills—without any reduction under Civil Code section 2860—because it was worried about its exposure to Camera for bad faith insurance tactics. Subdivision (c) of Civil Code section 2860 provides: "The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." CHIL claims that by not reducing all defense bills, American Casualty voluntarily overpaid for legal services.

At the hearing, American Casualty's counsel explained that because Rady and CHIL refused to defend Camera, "we were in a situation where we had a nurse that we insured, who as we learned to our horror had put out $45,000 of his own money on

defending this ridiculous case, and . . . had actually mortgaged his house . . . to pay his attorney. So we accepted the defense. When we learned the hospital was not doing it, we accepted the defense and we paid the bills as quickly as we could. [¶] From the moment the defense was accepted, we lowered Mr. Brehme['s] rates to what we call our 2860 rates, but the 40-something thousand that had accumulated to that point, we just paid the bills. We didn't nitpick. We just paid the bills, and I think the hospital and CHIL should do the same."

In the insurance context, a "volunteer has been defined as ' "a stranger or intermeddler who has no interest to protect and is under no legal or moral obligation to pay under the circumstances." ' " (*State Farm & Fire Casualty Co. v. Cooperative of American Physicians* (1984) 163 Cal.App.3d 199, 203.) American Casualty had a duty to defend under its policy and it was certainly not acting as a volunteer in the *Washington* action, even if it was motivated in part by a desire to avoid exposure to a bad faith claim. (See also *State Farm Fire & Casualty Co. v. Cooperative of American Physicians*, *supra*, 163 Cal.App.3d at p. 204; *State Farm Fire & Casualty Co. v. East Bay Municipal Utility Dist.* (1997) 53 Cal.App.4th 769, 777-778; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1598, fn. 12; *Smith v. Travelers Indemnity Co.* (1973) 32 Cal.App.3d 1010, 1019.) Further, having reneged on its own duty to defend, and its initial agreement to defend, CHIL cannot reasonably complain that American Casualty did not pick up defense costs in a timely manner, or about the amount of attorney fees it paid on Camera's behalf. (*Arenson v. National Auto & Cas. Ins. Co.* (1957) 48 Cal.2d 528, 539.)

E

CHIL also challenges the court's finding that American Casualty satisfied the seventh element of the *Fireman's Fund* test for equitable subrogation, that justice requires that the loss be entirely shifted from it to CHIL. (*Fireman's Fund, supra*, 65 Cal.App.4th at p. 1292.) Again, we disagree with CHIL.

As discussed, the American Casualty policy contains an "excess only other insurance" clause. As the court found, the policy "has a strongly and clearly worded 'other insurance' clause that makes it secondary to other insurance available to the insured." "An insurance company can choose which risks it will insure and which it will not, and coverage limitations set forth in a policy will be respected." (*Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.* (1998) 66 Cal.App.4th 1080, 1086.)

Moreover, Camera paid a modest annual premium for the American Casualty policy, merely $89, and contrary to CHIL's assertion the amount is relevant in determining the reasonable expectations of the insureds regarding coverage. (See *Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.*, *supra*, 66 Cal.App.4th at p. 1086 ["The insured's payment of a relatively small premium suggests that Charter Oak provided coverage for the relatively small risks associated with the Marina Inn, not the much larger risks associated with all of WSLA's projects."]; *International Surplus Lines Ins. Co. v. Devonshire Coverage Corp.* (1979) 93 Cal.App.3d 601, 612, disapproved of on another ground in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 827 [if insured paid relatively small premium it is unreasonable to expect insurer intended to

create new areas of risk]; *Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192, 197 [premiums commensurate with level of risk covered].)

We conclude that neither American Casualty nor Camera intended that its policy would cover the professional liabilities of a pediatric nurse working for a hospital, which would, of course, carry malpractice insurance to protect itself and its employees. We agree with the court that as a matter of law the equities favor American Casualty. As the court explained in its order: "[I]t is clear . . . that the policies at issue here arose in a commercial context in which CHIL should have expected to take on the primary obligation to defend and indemnify Camera. It is equally clear . . . that the equitable position of [Rady] and CHIL is substantially inferior to that of [American Casualty]. Camera was a nurse employed by [Rady], and CHIL is [Rady's] captive insurer. The actions of Camera alleged to have given rise to liability in the *Washington* action occurred while Camera was on duty on the premises of [Rady]. . . . By contrast, from the standpoint of Mr. Camera, the [American Casualty] policy was clearly the 'suspenders' to the 'belt' of the CHIL policy."[8]

---

8 CHIL's reliance on *Maryland Cas. Co. v. Nationwide Mut. Ins. Co.* (2000) 81 Cal.App.4th 1082 (*Maryland*), is misplaced. In *Maryland*, the general contractor was named as an additional insured on the policies of two subcontractors on a project. The general contractor and many subcontractors were sued for construction defects. The issue in *Maryland* was whether the general contractor's insurer was entitled to equitable subrogation from the insurer of the two subcontractors for the entire remaining balance of the general contractor's defense costs. This court held equitable contribution was the appropriate remedy because the policies at issue could not reasonably be interpreted to require the insurer of the two subcontractors to pay defense costs attributable to the negligence of the general contractor or others. (*Id.* at p. 1091.) Those facts have nothing to do with the facts here.

III

Equitable Subrogation from Rady

Rady contends the court erred by finding it had an indemnity duty under Labor Code section 2802, because there are triable issues of fact as to whether Camera's alleged conduct was within the course and scope of his employment.

" 'California has a strong public policy that favors the indemnification (and defense) of employees by their employers for claims and liabilities resulting from the employees' acts within the course and scope of their employment.' " (*Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 952.) Labor Code section 2802, subdivision (a) provides for an employee's right to indemnity. It reads: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, . . . even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

"The statute requires the employer not only to pay any judgment entered against the employee for conduct arising out of his employment but also to defend an employee who is sued for such conduct. Unlike an insurer, the employer need not defend whenever there is a mere potential for liability. However, if the employer elects to run a risk and refuses to defend, the employer must indemnify the employee for his attorney fees and costs in defending the underlying action if the employee was sued for acts within the scope of his employment." (*Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096, 1100; Lab. Code, § 2802, subd. (c).)

"In determining whether for purposes of indemnification an employee's acts were performed within the course and scope of employment, the courts have looked to the doctrine of respondeat superior. [Citations.] [¶] Under that doctrine, an employer is vicariously liable for risks broadly incidental to the enterprise undertaken by the employer—that is, for an employee's conduct that, in the context of the employer's enterprise, is 'not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.]' [Citations.] An employer is not vicariously liable for an employee's conduct if the employee substantially deviates from his or her course of duty so as to amount to a complete departure. [Citations.] . . . [A]n employee's conduct may fall within the scope of his employment even though the act does not benefit the employer, even though the act is willful or malicious, and even though the act may violate the employer's direct orders or policies." (*Jacobus v. Krambo Corp.*, *supra*, 78 Cal.App.4th at pp. 1101-1102.)

"The question whether an employee's acts are within the scope of employment is ordinarily a question of fact, but the issue may be determined as a question of law when the material facts are undisputed and no conflicting inferences are possible." (*Jacobus v. Krambo*, *supra*, 78 Cal.App.4th at p. 1103.)

We agree with the court's finding in American Casualty's favor. While sexual misconduct falls outside the course and scope of employment (*Jacobus v. Krambo, supra,* 78 Cal.App.4th at p. 1102), it is undisputed that the *Washington* action was settled before trial and the sexual misconduct charge was not substantiated. American Casualty submitted a letter from Rady's law firm, Brisbois, which states, "Although the complaints

of sexual misconduct were not substantiated, Mr. Camera was terminated for misuse of hospital equipment and other violations of hospital policies and procedures." Rady raised no evidentiary objection to the letter. As the court noted, "If it had been [substantiated], is it reasonable to think that the case would have settled for only $15,000?"

Rady asserts there are triable issues of fact as to the nature of Camera's conduct, but it does not cite the record in support of the assertion. We have nonetheless reviewed Rady's responsive separate statement independently, and we see no triable issue of material fact pertaining to Camera's conduct. Indeed, in its responsive separate statement Rady claimed that whether the sexual misconduct claims were substantiated was immaterial and irrelevant to American Casualty's summary judgment motion.

The other allegations in the *Washington* action were that Washington is a diabetic who takes insulin, when she was visiting her newborn son at Rady, Camera approached her and offered to assist her in getting an insulin injection, and the actual substance he injected was unknown to her. The giving of an injection by an on-duty registered nurse to a non-patient in the hospital setting was within the course and scope of his employment for purposes of respondeat superior, even though it was against Rady's policy. Accordingly, Rady is required to reimburse Camera for sums expended in the underlying case, and equitable subrogation is proper. For these same reasons, the equities favored American Casualty over Rady for purposes of subrogation.[9]

---

9 Given our holding, we are not required to address the collective bargaining agreement between Rady and United Nurses of Children's Hospital.

IV

Declaratory Relief

Rady and CHIL contend the court erred by granting declaratory relief under the first through fourth counts of American Casualty's complaint. The judgment declares summary adjudication of those counts is proper because CHIL and Rady are primarily responsible for indemnifying and defending Camera in the *Washington* action.

Code of Civil Procedure section 1060 provides: "Any person . . . who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties. . . . He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time." (See also Code Civ. Proc., § 1062 ["The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."].)

The statutes do not suggest declaratory relief is unavailable when the underlying action is resolved. To the contrary, actions to determine the rights and duties of mutual insurers are commonly brought after resolution of the underlying cases. (See, e.g., *Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 109-110;

Hartford Cas. Ins. Co. v. Mt. Hawler Ins. Co. (2004) 123 Cal.App.4th 278, 281, 285; *Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 31; *State Farm Fire & Cas. v. Cooperative of American Physicians* (1984) 163 Cal.App.3d 199, 202.)

The cases CHIL and Rady cite are not on point. For example, in *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388 (*Gafcon*), this court held the lower court properly granted summary judgment on a declaratory relief cause of action on the ground there was no present controversy between the parties. (*Id.* at p. 1402.) The declaratory relief claim alleged an insurer's use of in-house counsel in an underlying case constituted the practice of law by the insurer, and the insured was entitled to independent counsel. By the time the summary judgment motion was heard, however, in-house counsel had been removed and independent counsel had been appointed. (*Id.* at p. 1404.) We explained that "declaratory relief ' "operates prospectively, and not merely for the redress of past wrongs." ' " (*Id.* at p. 1403.) Here, there was an existing controversy between the parties when the summary judgment motion was heard.

Perhaps the declaratory relief counts were unnecessary and redundant since American Casualty had a ripe claim against CHIL and Rady for equitable subrogation, and declaratory relief generally " 'serves to set controversies at rest *before* they lead to repudiation of obligations, invasion of rights or commission or wrongs.' " (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848) CHIL and Rady, however, ignore the rule that "[a]nyone who seeks an appeal to predicate a reversal of [a judgment] on error must show that it was prejudicial. (Cal. Const., art. VI, § 13.)' " (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [in the context of a summary judgment motion].) No prejudice

appears here as the declaratory relief and equitable subrogation portions of the judgment are based on identical facts.[10]

DISPOSITION

The judgment is affirmed. American Casualty is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.

10 In its reply brief, Rady for the first time on appeal asserts Camera's unreasonable rejection of the defense counsel it appointed for him, Trexler, precludes him from recovering attorney fees for his personal counsel. The appellant abandons an issue by failing to raise it in his or her opening brief. (*California Recreation Industries v. Kierstead* (1988) 199 Cal.App.3d 203, 205, fn. 1.)